Periyakaruppan as his substitute and that Periyakaruppan was acting on the strength of the instrument (P/A 2) appointing him as substitute with general powers. Karuppan did not state that Periyakaruppan was given any authority from the head office of the plaintiff's firm to act in Seremban. There is no evidence that the plaintiff, at any time before the institution of these proceedings, contended that Subramaniam had exceeded his authority in executing P/A 1. There is, however, evidence that the plaintiff has taken no action to repudiate any of the transactions done by Periyakaruppan. Karuppan stated in his evidence that he could not say whether Periyakaruppan was a good or a bad manager though nothing was done about Periyakaruppan's transactions because he is dead.

Periyakaruppan carried on the business until 10th September, 1942, when he executed P/A 3, appointing Kasi; he died ten days later in Seremban.

Kasi took over from Periyakaruppan and continued to conduct the plaintiff's business in Seremban until Karuppan took over in July, 1947.

With the outbreak of hostilities in December, 1941, lines of communication between this country and India were broken and were not resumed until the end of the occupation, that is in September, 1945. Between these two dates it was not likely that the plaintiff could communicate with Kasi and inform him that P/A 3 was null and void and that he had no *locus standi* in the firm. But even after Karuppan took over, no action was taken by the plaintiff to repudiate Kasi's transactions until 1949.

When Karuppan took over he took no action to attack Kasi's authority. On the 25th September, 1946, Kasi had written to the Commissioner of Land Revenue sending two restriction notices about the land affected by the dischargee, stating that the discharge was paid in Japanese currency. The defendant replied that payment was made in British currency; no action was ever taken by Karuppan to inform the Collector of Land Revenue that Kasi had no authority to sign for the firm. The reason given by Karuppan for failing to take any action is that he was told that nothing could be done because of the Moratorium.

The conduct of the plaintiff after the execution of P/A 1 by Subramaniam, if it does not amount to a confirmation of the intention to give Subramaniam full authority to appoint a substitute, amounts to a ratification by the plaintiff of Subramaniam's action.

For the above reasons I hold that Kasi had authority to act and bind the plaintiff and the suit is dismissed with costs.

Suit dismissed.

REG. v. BAICHAND.

[App. Crim. Juris. (Spenser Wilkinson, J.) November 3, 1952]

[Penang — Criminal Appeal No. 20 of 1952]

Custom Enactment, ss. 117 and 119 — Disposal of Exhibits — Property "produced before the Court" — Meaning of — Criminal Procedure Code (Cap. 21), s. 435.

There being no provision in the Customs Enactment enabling the Court to deal with goods which have been seized but are not liable to seizure and no provision in the Criminal Procedure Code enabling a Criminal Court to transfer the ownership or possession of innocent goods the only course open to the Magistrate in the present case was to order the return of the exhibits to the authority which had produced them, namely the Customs authorities.

Semble: For the purposes of section 435 of the Criminal Procedure Code the only property which can be said to have been "produced before the Court" is the property which has been physically produced before it.

Cases referred to :—

(1) *Soon Chee Kong v. Public Prosecutor* (1951) M.L.J. 86; (1951) M.L.R. 84.

(2) *De Keyser v. British Railway Traffic & Electric Co. Ltd.* (1936) 1 K.B. 224.

CRIMINAL APPEAL.

C. M. Sheridan (Federal Counsel) for the Crown.

R. D. Hume for the respondent.

The facts and arguments appear sufficiently from the judgment.

Spenser Wilkinson, J. : — This was an appeal by the Crown against the acquittal of the respondent on a charge under sections 117 and 119 of the Customs Enactment and against the order made by the Magistrate for the disposal of certain exhibits.

The case arose in respect of 3,000 heavy cees gunny bags, which were seized on the wharf whence they were about to be exported, on the ground that they were a prohibited export. The bags in question were contained in twelve bundles and one of those bundles was produced in Court as Exhibit P. 1. One sack out of this bundle was separately marked as Exhibit P. 2.

Before the hearing of the appeal the Deputy Public Prosecutor had given notice that he would not proceed on his first ground of appeal which related to the acquittal, so that the appeal against the acquittal was in effect withdrawn. The only matter for argument left in the appeal therefore was whether or not the order of the Magistrate that Exhibits P. 1 and P. 2 should be delivered to accused No. 1 was correct.

Owing to the fact that the appeal started as one against an acquittal the learned Magistrate did not deal in his grounds of judgment with the question of

the disposal of the goods, and I therefore have not had the advantage of knowing on what ground he proceeded. His note on this point simply reads as follows :—

"Not liable to seizure. P. 1 and P. 2 to No. 1".

It was argued by Mr. Sheridan on behalf of the Crown that the Magistrate had no power to release these goods which had been seized by the Customs under the provisions of the Customs Enactment and he relied upon the decision of the Court of Appeal in *Soon Chee Kong v. Public Prosecutor*[1] and upon the provisions of section 108 of the Customs Enactment.

Mr. Hume for the respondent argued that the decision of the Court of Appeal cited above must have been based upon the English decision in *De Keyser v. British Railway Traffic & Electric Co. Ltd.*[2], which decided that once goods were liable to forfeiture the Justices were bound to order forfeiture. He contrasted the position in that case with the position here, where the goods were not liable to seizure in view of the acquittal of the accused and were, therefore, not liable to forfeiture.

I was inclined at first to think that my decision in this appeal must be based solely upon the judgment of the Court of Appeal in *Soon Chee Kong v. Public Prosecutor*. The following passage from that judgment appeared to me to be relevant :—

"To sum up, in our view, sub-section (ii) of section 106 and sub-section (v) of section 108 of the Enactment only enable the Courts to order the forfeiture of goods, and that action can only be taken if it is proved to the satisfaction of the Court that they were liable to seizure under the Enactment. If goods seized were not, in fact, liable to seizure under the Enactment, their release should follow as a matter of law. The power to order the release of goods liable to forfeiture is clearly and unequivocally vested only in the executive."

I think it is clear from this passage that where goods are liable to seizure the question of their release is one for the Executive and not for the Courts. The judgment, however, does not deal in any detail with the position where it turns out that the goods are not liable to seizure. The remark "If goods seized were not, in fact, liable to seizure under the Enactment, their release should follow as a matter of law" does not tell us what the procedure for release is to be in such a case. I think, however, that the "law" here referred to must be the general law and not the Customs Enactment.

We have here then the position that goods seized by the Customs but belonging to an accused person who has been acquitted are in the hands of the Court. What is to be done with them? Chapter XXXVIII of the Criminal Procedure Code contains detailed provisions for the disposal of property by the Court when the property has been the subject of an offence. But there is no express provision anywhere in the Code dealing with the disposal of property produced before the Court which is *not* the subject matter of any offence. In this respect our section 435 differs materially from the equivalent Indian section 517 as well as from the equivalent section in the F.M.S. Code. In the Indian section the word "or" appears immediately before the words "regarding which any offence appears to have been committed" with the result that under that section there are four distinct classes of property with which the Court can deal. In our section, however, there are only two classes of property that can be dealt with, that is to say property produced before it regarding which any offence appears to have been committed or property produced before it which has been used for the commission of any offence.

The general question therefore arises as to what the Court is to do with property produced before it which is not the subject matter of any offence, which I will call innocent goods. Section 59 of the Code gives wide powers to the Court to order the production of "things" before it and exhibits of various kinds which have no direct connection with the offence which has been committed are often produced before the Court.

On this question Mr. Hume conceded that it was not normally right for a Criminal Court to adjudicate on rival claims to property before it and he thought that such a Court could only return the property to the person from whom it came. I think it is clear that as the Court has jurisdiction to order anybody to produce a thing before it, it must have inherent jurisdiction to deal with it when the case is over; but I agree that, unless the owner or person in possession consents to some other course, it must return the thing, in due course, to the person who produced it. I do not think its inherent jurisdiction can go beyond this, because otherwise it would in effect be adjudicating upon rights of property, which is normally a matter for the Civil Courts.

There being no provision in the Customs Enactment enabling the Court to deal with goods which have been seized but are not liable to seizure and no provision in the Criminal Procedure Code enabling a Criminal Court to transfer the ownership or possession of innocent goods I came to the conclusion that the only course open to the Magistrate in the present case was to order the return of the exhibits to the authority which had produced them, namely the Customs authorities.

There was, at my request, some argument before me as to whether in a case of this kind where samples

of bulk property were produced before the Court the whole bulk was before the Court or only the samples. In the view I have taken of this case it is not necessary for me to decide this difficult point; but I am inclined to think that, at all events for the purposes of section 435 of the Criminal Procedure Code, the only property which can be said to have been "produced before the Court" is property which has been physically produced before it.

For the above reasons I allowed the appeal in so far as the Magistrate's order relating to exhibits was concerned and substituted therefor an order that Exhibits P. 1 and P. 2 be returned to the Customs authorities. The appeal against the acquittal, not having been proceeded with, was dismissed.

Magistrate's order varied.

YONG NYAT YU & ANOR. v. LEE KEE.

[Orig. Civ. Juris. (Wilson, J.) August 21, 1952]
[K. L. — Civil Appeal No. 12 of 1952]

Landlord and tenant — Possession — Arrears of rent — Whether deposit as rent in advance affects arrears on due date.

The defendant paid two months rent on deposit at the request of the plaintiffs who agreed to refund the deposit at the end of the tenancy. After paying the deposit the defendant continued to pay his rent monthly in arrears until May 1951. In July the plaintiffs served him with notice to quit on the ground that his rent had been in arrears more than 14 days.

Held: as the plaintiffs held two months rent as deposit at the time of the notice to quit, no rent was therefore due.

CIVIL APPEAL.

S. M. Yong for the appellants-plaintiffs.

D. G. Rawson for the respondent-defendant.

Cur. Adv. Vult.

Wilson, J. : — The plaintiffs are the landlords of No. 92A Tong Shin Terrace, Kuala Lumpur and the defendant the tenant thereof. By a letter dated 16th July, 1951, the plaintiffs through their solicitors informed the defendant that he was more than 14 days in arrears with his rent and requested him to vacate the premises on the 31st August, 1951. The defendant did not vacate the premises and on the 11th October, 1951, the plaintiffs filed a claim in the Magistrates' Court claiming vacant possession and and arrears of rent and mesne profits.

At the trial it was suggested *inter alia* that the defendant had tendered the rent for the months of May and June, 1951, which allegedly had not been paid. Mr. Rawson has admitted now that there was no valid tender of the rent by the defendant and therefore no point arises in that connection in this appeal.

The learned Magistrate found that on the 16th July, 1951, the defendant was not in arrears with his rent for other reasons.

The plaintiffs bought the house No. 92A Tong Shin Terrace in January, 1951, at which date the defendant was already a tenant. The plaintiffs' manager saw the defendant and told him that the plaintiffs had bought the house and he asked for two months rent on deposit which he received. According to the manager the amount of this deposit was to be refunded at the end of the tenancy. The learned Magistrate found that as on the 16th July, 1951 the plaintiffs held the deposit as rent in advance no arrears of rent were due on that date. The first proviso to section 4(1) of the Control of Rent Ordinance, 1948 provides that it shall not be unlawful for a landlord to receive and for a tenant to pay in advance rent not exceeding three months' rent. The proviso does not refer to a deposit to be refunded at the end of the tenancy. If such a deposit is not to be regarded as an advance of rent, it is arguable that it would be a valuable consideration in addition to the rent and would be contrary to the provisions of section 4(1) of the Ordinance. In my view the agreement between the manager and the defendant that the deposit should be refunded at the end of the tenancy can only be regarded as an agreement that this should be done if at that time the defendant had paid all his rent and no rent was then due to the plaintiffs. After paying the deposit the defendant continued to pay his rent monthly in arrears although not on regular dates until May, 1951. It is admitted that the rent for May and June was not validly tendered, but I agree with the learned Magistrate that as at the time of the notice to quit the plaintiffs held two months rent on deposit they cannot be heard to say that any rent was due. In these circumstances I find that the notice to quit was bad and the appeal against the Magistrate's refusal to make an order for vacant possession is dismissed.

The learned Magistrate, however, has not referred in his grounds of judgment to the claim for rent. The plaint was filed on the 13th October, 1951, and it seems clear that at that date the defendant owed rent for July, August and September which had not been validly tendered. In these circumstances judgment must be entered in the lower Court for the rent for those months at $43.75 per month, amounting to $131.25 and the plaintiffs must have such costs in the Court below as would have been due to them if judgment had been entered in the Court below for them for that amount.

So far as the costs of the appeal are concerned there will be no order.

Appeal dismissed.